MAJLIS PERBANDARAN SEBERANG PERAI

v.

TROPILAND SDN. BHD.

COURT OF APPEAL, KUALA LUMPUR
TUAN GOPAL SRI RAM JCA
DATO' NH CHAN JCA
DATUK MOHKTAR SIDIN JCA
[CIVIL APPEAL NO: P 02-11-96]
22 AUGUST 1996

LOCAL GOVERNMENT: *Buildings – Conditions imposed in layout and earthworks plans – Monsoon and perimeter drains not completed – Whether refusal of Certificate of Fitness for Occupation lawful – Whether conditions were imposed mid-stream – Whether developer had legitimate expectation – Whether delay in taking out summons fatal.*

LOCAL GOVERNMENT: *Buildings – Town and Country Planning Act 1976 – Street, Drainage and Building Act 1978 – Whether connected pieces of legislation for purposes of land development – Whether developer must comply with both Acts – Whether conditions imposed by local authority on earthworks important.*

LOCAL GOVERNMENT: *Buildings – Whether amended layout plan and earthworks plan must be read together – Extrinsic evidence rule – Whether applicable to public law matter.*

LOCAL GOVERNMENT: *City Council – Refusal to grant Certificate of Fitness for Occupation – Conditions attached to approval of planning permission not met – Whether refusal ultra vires or unreasonable.*

ADMINISTRATIVE LAW: *Exercise of judicial functions – Judicial review – Exercise of discretion by public decision-maker – Illegality – Wednesbury unreasonableness or irrationality – Whether Court examines decision-making process only – Whether Court reviews substance of decision on merits – Ramachandran v. The Industrial Court of Malaysia – Whether Court must examine the facts and determine if decision is reasonable.*

CIVIL PROCEDURE: *Declaration – Distinction between jurisdiction and discretion – Exercise of judicial discretion to refuse declaratory relief – Whether an exercise of jurisdiction or a denial of it – Granting or refusal of declaratory relief – Whether discretionary.*

CIVIL PROCEDURE: *Damages – Assessment of damages – Absence of judgment awarding damages – Whether an inquiry into or an assessment of damages may take place.*

The respondent in the instant appeal had wanted to build an eleven-storey building ('the project') on a piece of land ('the project land') which it owns. However, the Majlis Perbandaran Seberang Perai ('the appellant') which approved both the layout plan and the earthworks plan for the project attached two conditions thereto. The first required the respondent to construct/upgrade a monsoon drain on a piece of State land ('the State land') adjoining the project land. This State land had squatters on it. The second condition required the respondent to construct a perimeter drain on the project land itself.

Thereafter, the respondent commenced work on the project. Midway through it, however, the respondent submitted an amended layout plan ('the amended layout plan') to build a five-storey building instead of the originally intended 11-storey building. The amended layout plan was approved by the appellant, but again with conditions, *viz*, that the respondent had to submit a fresh earthworks plan. In the result, the respondent had completed 80% of the monsoon drain, when it ceased construction work thereof due to impediments from an adamant squatter. The perimeter drain was, however, wholly unbuilt.

Upon the completion of the project, the respondent applied for a Certificate of Fitness for Occupation ('the Certificate') from the appellant. This was refused on account of the respondent's failure to fulfil the conditions pertaining to the construction of both the monsoon and perimeter drains. As a result, the respondent took out an originating summons praying for declarations that the appellant's refusal to issue the Certificate was unlawful. The trial Judge before whom the matter went found the appellant to have acted *ultra vires* and unreasonably, and granted, *inter alia*, declarations that the appellant was neither entitled in law nor justified in the exercise of its discretion to require the respondent, as a condition precedent to the issuance of the Certificate, to construct a perimeter drain on the project land and to complete the monsoon drain on the State land notwithstanding the presence of any unauthorised and/or illegal structures on it.

The appellant appealed.

Held:

[1] Until very recently, it was thought that when the exercise of discretion by a public decision-maker is challenged on the ground of 'illegality' or 'Wednesbury unreasonableness' (irrationality), the Court merely examines the decision-making process and not the substance or correctness of the decision itself on merits. The fallacy of this approach has now been exposed by the recent majority-decision of the Federal Court in *Ramachandran v. The Industrial Court of Malaysia.* This landmark decision has refuted the theory that judicial review is always concerned with the decision-making process and never with the decision itself. It follows, therefore, that when the exercise of discretion by a public body,

such as the appellant, is challenged, the Court is entitled to, and indeed it must, examine the facts and determine whether the decision arrived at is reasonable.

[2] There is a vital distinction between 'the jurisdiction of the Court, or the lack of it, to entertain an action for declaratory relief or other discretionary remedies' and the 'exercise of the Court's discretion to grant or refuse such relief or remedies sought.' The granting or refusal of a declaratory relief is discretionary in nature. A plaintiff who establishes his right may, nevertheless, be refused declaratory relief; and a refusal in such circumstances is, in fact, an exercise of jurisdiction, not a denial of it.

[3] The conditions about which the respondent complained were not new ones which were imposed mid-stream at the whims and fancies of the appellant. They were there all along and the respondent took on the project fully cognisant of the ramifications that were entailed. The appellants had not acted unreasonably or in bad faith.

[4a] The condition in respect of the monsoon drain could not and should not be read *in vacuo*; it must be read in the light of the circumstances prevailing at and about the site at which the respondent proposed to build its building. At the time the condition was endorsed on the layout plan, the respondent knew, or must be taken to have known, of the presence of squatters on the State land. Yet, it did not complain about the said condition at the time it was imposed, nor did it appeal against its imposition. The respondent did nothing for three years. Therefore, it ought not to be heard to complain now.

[4b] The respondent's submission, that it had a legitimate expectation that the State land on which the monsoon drain was to be constructed would be made available to it, was not correct. The condition in respect of the monsoon drain was there from the very beginning; it was not subsequently imposed. The respondent did not only remain silent for three years but had completed 80% of the monsoon drain before taking objection. Thus, the doctrine of legitimate expectation had no application whatsoever to the facts of the instant appeal. In any case, this submission was an entirely new point as it was not raised in the Court below.

[5a] The trial Judge had treated the Town and Country Planning Act 1976 ('the 76 Act') and the Street, Drainage and Building Act 1978 ('the 78 Act') as separate and unconnected pieces of legislation for the purposes of land development. In Malaysia, there are several pieces of written law that regulate the development of land and the construction of or alteration to buildings. All these written laws contain requirements of one sort or another; and anyone proposing to engage in land development must observe the provisions of all written laws that regulate this form

of human activity. Thus, it was wrong to say that compliance with the conditions attached to the planning permission granted under the 76 Act was sufficient. Regard must also be had to the 78 Act which governs earthworks. The trial Judge had misunderstood the important role played by earthworks plans in land development. It was in recognition of this importance that Parliament amended the 78 Act by introducing s. 70A(1), (2) and (3). It follows, therefore, that any conditions that are reasonably imposed by a local authority in relation to earthworks must be given the same importance as those conditions subject to which planning permission is granted under the parallel statute.

[5b] The trial Judge was wrong in assuming that all the necessary earthworks had been completed at the date the respondent's amended layout plan was approved. The perimeter drain, which was very much a part of the earthworks, was never constructed.

[5c] The trial Judge was wrong in concluding that the amended layout plan and the earthworks plan ought not to be read together. The authorities referred to and relied upon by his Lordship which dealt with the extrinsic evidence rule were in respect of bilateral instruments in private law. The instant appeal was on a public law matter. The layout plan, the earthworks plan, and the amended layout plan must all be read together. The respondent could not merely say that it had met with all the conditions appearing on the amended layout plan. It must also comply with the conditions that appear on the earthworks plan; the condition in respect of the perimeter drain might not have appeared on the amended layout plan but it did appear on the earthworks plan.

[6] The trial Judge was wrong in making the order directing an inquiry into damages. The respondent was not asking for an award of damages but merely for an assessment. Before an inquiry into or an assessment of damages may take place, there must be a judgment awarding damages; for it is only under a judgment awarding damages that an assessment or inquiry may arise.

[Appeal allowed; declarations and order directing assessment of damages set aside; and respondent's originating summons dismissed]

[Appeal from High Court Malaya, Pulau Pinang; Originating Summons No: 24-718-93]

***[Bahasa Malaysia** Translation of Headnotes]*

***KERAJAAN TEMPATAN:** Bangunan – Syarat-syarat yang dikenakan dalam pelan-pelan susun atur serta kerja-tanah – Parit monsoon dan parit perimeter yang belum siap – Samada keengganan memberikan Sijil Layak Untuk Menduduki sah – Samada syarat-syarat dikenakan semasa kerja*

sedang dijalankan – Samada pemaju mempunyai jangkaan sah – Samada kelewatan mengeluarkan saman boleh memudaratkan.

KERAJAAN TEMPATAN: *Bangunan – Akta Perancangan Bandar & Desa 1976 – Akta Jalan, Parit dan Bangunan 1978 – Samada terdapat bahagian-bahagian perundangan yang dicantumkan untuk tujuan pembangunan tanah – Samada pemaju harus mematuhi kedua-dua Akta – Samada syarat-syarat yang dikenakan oleh pihak berkuasa tempatan ke atas kerja-tanah adalah penting.*

KERAJAAN TEMPATAN: *Bangunan – Samada pelan susun atur terpinda dan pelan kerja-kerja tanah harus dibaca bersama – Kaedah keterangan ekstrinsik – Samada terpakai kepada perkara undang-undang awam.*

KERAJAAN TEMPATAN: *Majlis Perbandaran – Keengganan untuk memberikan Sijil Layak Untuk Menduduki – Syarat-syarat yang dilampirkan kepada kelulusan kebenaran perancangan tidak dipenuhi – Samada keenggan adalah ultra vires atau tidak wajar.*

UNDANG-UNDANG PENTADBIRAN: *Pelaksanaan fungsi kehakiman – Kajian semula kehakiman – Pelaksanaan budibicara oleh pembuat keputusan awam – Kepenyalahan undang-undang – Ketidak-wajaran dan keadaan tidak rasional Wednesbury – Samada Mahkamah meneliti proses membuat keputusan sahaja – Samada Mahkamah mengkaji semula substans keputusan berdasarkan merit – Ramachandran lwn. The Industrial Court of Malaysia – Samada Mahkamah haruslah meneliti fakta-fakta dan menentukan jika keputusan adalah wajar.*

PROSEDUR SIVIL: *Pengisytiharan – Perbezaan antara budibicara dan bidangkuasa – Pelaksanaan budibicara kehakiman untuk menolak relief pengisytiharan – Samada merupakan budibicara.*

PROSEDUR SIVIL: *Gantirugi – Taksiran gantirugi – Ketiadaan penghakiman yang memberikan gantirugi – Samada satu siasatan ke dalam atau suatu taksiran gantirugi boleh dilakukan.*

Responden dalam rayuan semasa ini hendak membina sebuah bangunan 11 tingkat ('projek tersebut') di atas sebidang tanah ('tanah projek tersebut') yang dimiliki olehnya. Walaubagaimanapun, Majlis Perbandaran Seberang Perai ('perayu di sini') yang meluluskan kedua-dua pelan susun atau serta pelan kerja-kerja tanah untuk projek tersebut telah mengenakan dua syarat padanya. Syarat yang pertama menghendaki responden membina/mempertingkatkan sebuah parit monsoon yang terdapat di atas tanah kerajaan ('tanah kerajaan tersebut') yang berdekatan dengan tanah projek tersebut. Tanah kerajaan ini diduduki oleh setinggan. Syarat yang kedua menghendaki responden membina sebuah parit perimeter di atas tanah projek itu sendiri.

Selepas itu, responden telah memulakan kerja-kerja bagi projek tersebut. Semasa kerja sedang dijalankan, walaubagaimanapun, responden telah mengemukakan satu pelan susun atur terpinda ('pelan susun atau terpinda') untuk membina sebuah bangunan lima tingkat dan bukannya menurut tujuan asalnya, sebuah bangunan 11 tingkat. Pelan susun atur terpinda itu telah diluluskan oleh perayu, tetapi sekali lagi dengan syarat, iaitu, bahawa responden tersebut hendaklah mengemukakan satu pelan kerja-kerja tanah yang baru. Kesudahannya, responden telahpun menyiapkan parit monsoon tersebut pada tahap 80%, ketika ianya memberhentikan kerja-kerja pembinaannya yang disebabkan oleh halangan daripada setinggan yang degil. Parit perimeter tersebut, walaubagaimanapun, telah tidak dibina sama sekali.

Setelah siap projek tersebut, responden telah memohon untuk mendapatkan Sijil Layak Untuk Menduduki ('Sijil tersebut') daripada perayu. Permohonan ini telah ditolak atas alasan kegagalan responden untuk memenuhi syarat-syarat berhubung dengan pembinaan kedua-duanya parit monsoon serta parit perimeter tersebut. Akibat daripada itu, responden telah mengeluarkan saman pemula untuk pengisytiharan bahawa keengganan perayu untuk mengeluarkan Sijil tersebut adalah salah di sisi undang-undang. Hakim perbicaraan yang mendengar perkara tersebut mendapati perayu telah bertindak *ultra vires* dan dengan cara yang tidak wajar, dan telah memberikan, antara lainnya, pengisytiharan bahawa perayu tidak berhak di sisi undang-undang mahupun wajar dalam melaksanakan budibicaranya bagi menghendaki responden, sebagai satu syarat duluan untuk pengeluaran Sijil tersebut, untuk membina sebuah parit perimeter di atas tanah projek tersebut dan untuk menyiapkan parit monsoon di atas tanah kerajaan tanpa menghiraukan adanya apa-apa struktur yang tidak dibenarkan dan/atau salah di sisi undang-undang.

Perayu telah merayu.

Diputuskan:

[1] Sehingga baru-baru ini, adalah dianggapkan bahawa ketika pelaksanaan budibicara yang dilakukan oleh pembuat-keputusan awam dicabar atas alasan 'kepenyalahan undang-undang' atau 'ketak-wajaran Wednesbury' (keadaan tidak rasional), Mahkamah akan hanya meneliti proses membuat keputusan tersebut dan bukannya substans ketepatan keputusan itu sendiri berdasarkan merit. Salah anggapan terhadap pendekatan ini kini telah didedahkan oleh keputusan majoriti Mahkamah Persekutuan baru-baru ini dalam *Ramachandran v. The Industrial Court of Malaysia.* Keputusan penting ini telah menyangkal teori bahawa kajian semula kehakiman hanya mengambil berat akan proses membuat keputusan dan tidak sama sekali terhadap keputusan itu sendiri. Dengan itu didapati, bahawa ketika pelaksanaan budibicara oleh sebuah badan awam, seperti perayu dicabar, Mahkamah tersebut adalah berhak, malahan ianya mestilah, memeriksa atau meneliti fakta-fakta dan menentukan samada keputusan yang telah dicapai itu adalah wajar.

[2] Terdapat perbezaan yang penting antara 'bidangkuasa Mahkamah atau ketiadaannya, untuk melayan sesuatu tindakan untuk relief pengisytiharan atau lain-lain remedi budi bicara' dan 'pelaksanaan budi bicara Mahkamah untuk memberikan atau menolak relief sedemikian yang dipohon'. Pemberian atau penolakan relief pengisytiharan adalah bersifat budi bicara. Plaintif yang menetapkan haknya boleh, namun begitu, ditolak daripada mendapat relief pengisytiharan, dan sesuatu penolakan dalam keadaan yang sedemikian adalah, pada hakikatnya, suatu pelaksanaan bidang kuasa, bukannya suatu penafian terhadapnya.

[3] Syarat-syarat yang diadukan oleh responden bukannya merupakan syarat-syarat baru yang dikenakan ketika kerja sedang dijalankan dengan sewenang-wenangnya oleh perayu. Syarat-syarat tersebut wujud di sepanjang pelaksanaan projek tersebut dan responden mengetahui sesungguhnya akan kerumitan yang terlibat ketika sanggup menerima projek tersebut. Perayu telah tidak bertindak dengan cara yang tidak wajar ataupun dengan niat yang jahat.

[4a] Syarat berhubung dengan parit monsoon tersebut tidak boleh serta tidak seharusnya dibaca *in vacuo;* ianya mesti dibaca memandangkan keadaan yang berlaku di persekitaran tapak tersebut di mana responden bercadang untuk membina bangunannya. Pada waktu syarat tersebut diendorskan pada pelan susun atur, responden mengetahui atau semestinya dianggap sebagai telah mengetahui, mengenai adanya setinggan di atas tanah kerajaan tersebut. Tetapi, ianya tidak mengadu mengenai syarat tersebut ketika ianya dikenakan, rayuan tidak juga dibuat berhubung dengan pengenaan syarat tersebut. Responden tidak membuat apa-apa selama tiga tahun. Dengan itu, aduannya kini tidak seharusnya didengar.

[4b] Penghujahan responden, bahawa ianya mempunyai jangkaan yang sah bahawa tanah kerajaan tersebut di atas mana parit monsoon seharusnya dibina akan diberikan kepadanya, adalah tidak benar. Syarat berhubung dengan parit monsoon terdapat sejak dari awal lagi, ianya tidak dikenakan kemudian. Responden bukan sahaja berdiam selama tiga tahun tetapi telah menyiapkan parit monsoon tersebut di peringkat 80% sebelum membuat bantahan. Dengan itu, doktrin jangkaan sah tidak terpakai sama sekali kepada fakta-fakta rayuan semasa ini. Dalam apa keadaan pun, penghujahan ini merupakan satu perkara yang baru secara keseluruhannya kerana ianya telah tidak dibangkitkan dalam Mahkamah di bawah.

[5a] Hakim perbicaraan telah menyifatkan Akta Perancangan Bandar & Desa 1976 ('Akta 76 tersebut') dan Akta Jalan, Parit dan Bangunan 1978 ('Akta 78 tersebut') sebagai berasingan dan perundangan yang tidak berkaitan bagi tujuan pembangunan tanah. Di Malaysia, terdapat beberapa undang-undang bertulis yang mengawal pembangunan tanah dan pembinaan atau pengubahan pada bangunan. Kesemua undang-undang

bertulis ini mengandungi sesuatu syarat yang tertentu ataupun yang lain, dan sesiapa yang bercadang untuk menjalankan pembangunan tanah mestilah mematuhi peruntukan-peruntukan kesemua undang-undang bertulis yang mengawal bentuk aktiviti kemanusiaan seperti ini. Dengan itu, ianya salah untuk menyatakan bahawa pematuhan syarat-syarat yang terlampir pada kebenaran perancangan yang diberikan di bawah Akta 76 tersebut adalah memadai. Perhatian haruslah juga diberikan kepada Akta 78 yang menguasai kerja-kerja tanah. Hakim perbicaraan telah tersalah faham akan peranan penting yang dimainkan oleh pelan kerja-kerja tanah dalam pembangunan tanah. Adalah atas kesedaran kepentingan ini bahawa Parlimen telah meminda Akta 78 dengan mengenalkan s. 70A(1), (2) dan (3). Oleh itu, apa-apa syarat yang dikenakan secara wajarnya oleh sesuatu pihak berkuasa tempatan berhubung dengan kerja-kerja tanah mestilah diberikan kepentingan yang sama seperti syarat-syarat itu tertakluk kepada mana kebenaran perancangan diberikan di bawah statut yang bersamaan.

[5b] Hakim perbicaraan adalah salah dalam menganggarkan bahawa kesemua kerja-kerja tanah yang perlu telah disiapkan pada tarikh pelan susun atur terpinda diluluskan. Parit perimeter, yang mana sesungguhnya merupakan sebahagian daripada kerja-kerja tanah tersebut, tidak pernah dibina.

[5c] Hakim perbicaraan adalah salah dalam memutuskan bahawa pelan susun atur terpinda dan pelan kerja-kerja tanah tersebut tidak seharusnya dibaca bersama. Autoriti-autoriti yang dirujuk dan terhadap mana yang arif telah bergantung kepadanya, yang berurusan dengan kaedah keterangan ekstrinsik adalah berhubung dengan suratcara dipihak dalam undang-undang persendirian. Rayuan semasa ini adalah berhubung dengan perkara-perkara undang-undang awam. Pelan susun atur, pelan kerja-kerja tanah dan pelan susun atur terpinda hendaklah kesemuanya dibaca bersama. Responden tidak boleh hanya menyatakan bahawa ia telah memenuhi kesemua syarat yang terdapat pada pelan susun atur terpinda. Ia juga patut memenuhi kesemua syarat-syarat yang terdapat pada pelan kerja-kerja tanah, syarat berhubung dengan parit perimeter mungkin tidak dapat pada pelan susun atur terpinda tetapi ianya terdapat pada pelan kerja-kerja tanah.

[6] Hakim perbicaraan salah dalam membuat perintah mengarahkan satu siasatan terhadap gantirugi. Responden tidak meminta satu award untuk gantirugi tetapi hanya untuk mendapatkan satu taksiran. Sebelum sesuatu siasatan terhadap gantirugi atau sebelum taksiran untuk gantirugi boleh dilakukan, haruslah terdapat satu penghakiman yang memberikan gantirugi; hanya dibawah penghakiman yang memberikan gantirugi boleh berbangkitnya satu taksiran atau siasatan.

[Rayuan dibenarkan; pengisytiharan-pengisytiharan dan perintah yang mengarahkan taksiran gantirugi diketepikan; dan saman pemula responden ditolak]

[Rayuan daripada Mahkamah Tinggi Malaya, Pulau Pinang Saman Pemula No. 24-718-93]

Cases referred to:

Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 KB 223 ***(cit)***

Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn. Bhd. [1979] 1 MLJ 135 ***(cit)***

Council of Civil Service Unions v. Minister for the Civil Service [1985] AC 374 ***(refd)***

Ramachandran v. The Industrial Court of Malaysia, Civil Appeal No: 02-13-94 ***(refd)***

Faber Merlin (M) Sdn. Bhd. & Ors. v. Lye Thai Sang & Anor. [1985] 2 MLJ 380 ***(cit)***

Arab-Malaysian Credit Bhd v. Tan Seang Meng [1995] 1 CLJ 773 ***(refd)***

Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan Berhad v. Majlis Perbandaran Pulau Pinang [1996] 3 CLJ 335 ***(dist)***

Rethina Development Sdn. Bhd. v. Majlis Perbandaran Seberang Perai, Butterworth [1990] 2 MLJ 111 ***(dist)***

Keng Huat Film Co. Sdn. Bhd. v. Makhanlall (Properties) Pte Ltd. [1984] 1 MLJ 243 ***(cit)***

Goh Eng Wah v. Yap Phooi Yin & Anor. [1985] 1 MLJ 329 ***(cit)***

Legislation referred to:

Evidence Act 1950, ss. 91, 92, 93

Street, Drainage and Building Act 1974

Street, Drainage and Building Act 1978, s. 70A(1), (2), (3)

Town and Country Planning Act 1976

JUDGMENT

Gopal Sri Ram JCA:

The respondent owns a piece of land in Seberang Perai which it wanted to develop. It wanted to construct a commercial building on the land. It was to be an 11-storey building with a supermarket. It hired an architect who drew up plans. Those plans had to be approved by the appellant which is the Local Authority in and for Seberang Perai. There were two plans; to start with. One is what is generally called the layout plan: the other had to do with the earthworks.

Under the law the respondent could not lawfully commence building work of any sort – including earth-work – without the approval of the appellant. It waited for the approvals to come. Eventually they came. The layout plan was approved by the appellant on 30 November 1984, while the earthworks plan was approved on 19 July 1986. The approvals came with conditions. One of the conditions required the respondent to construct or upgrade a monsoon drain on the land adjoining the respondent's property. That land belonged to the State.

There were squatters on it. Constructing the monsoon drain meant having to deal with these squatters. Another condition was that the respondent had to construct a perimeter drain on its land.

The respondent commenced construction. When the third floor of the building was under construction, it had a change of heart. It did not want to have 11 storeys. It proposed to have a five-storey building. So it got its architect to prepare and submit an amendment to the original plan. That was approved as well. Once again with conditions. There was a requirement to submit a fresh earthworks plan to the engineering department. What the appellant obviously wanted was either compliance with the conditions in the original earthworks plan or a new proposal on the drains.

The respondent constructed about 80% of the monsoon drain, dealing with the squatters as it went along. Then it ran into brick wall, as it were, with one of the squatters who, it appears, was a little adamant. At that point the respondent stopped work on the monsoon drain.

The respondent did not construct the perimeter drain. Mr. Yeoh who appeared for the respondent on the appeal has told us that there are good reasons for this. He has drawn our attention to the several plans and the endorsements on them. According to him, the area of the respondent's land on which the perimeter drains were to be constructed had to be surrendered to the Jabatan Kerja Raya (the Public Works Department), or JKR for short, for the construction of a road. We will deal with this aspect of the case later.

Having completed the building, the respondent applied to the appellant for a certificate of occupation so that it could put the building to use. But the appellant refused to issue such a certificate principally on the ground that the respondent had failed to comply with the conditions relating to the construction of the perimeter and the monsoon drains. Thereupon, the respondent took out an originating summons in which it claimed several declarations the effect of which was to declare as unlawful the appellant's refusal to issue the certificate of fitness for the building in question.

When the matter came on for hearing before Vincent Ng J, the respondent withdrew the first two declarations claimed in its summons. After hearing argument, the learned Judge granted the respondent the following relief:

(i) A declaration that the defendants are not entitled in law nor justified in the exercise of discretion to require the plaintiffs, as a condition for the issuance of an occupation certificate in respect of a block of five(5)-storey building (hereinafter referred to as 'the said building') on the plaintiffs' land known as Lots 368, 369 and 370 Mukim 15 Jalan Telaga Ayer, Butterworth (hereinafter referred to as 'the said land'), to construct a perimeter drain along the eastern and southern boundary of the said land;

(ii) A declaration that the defendants are not entitled in law nor justified in the exercise of discretion to require the plaintiffs, as a condition for the issuance of an occupation certificate in respect of the said building on the said land, to complete the construction of the monsoon drain on State land notwithstanding the presence of unauthorised and/or illegal structures on State land;

(iii) Damages to be assessed by the Senior Assistant Registrar of the High Court in respect of the loss and damage suffered by the plaintiffs on account of the defendants' failure and/or refusal to-date to issue an occupation certificate in respect of the said building on the said land.

He also awarded the respondent the costs of the action.

The Judge granted the declarations in question because he thought that the appellant was acting outside the law and unreasonably in imposing the conditions about the perimeter and monsoon drains. In doing so, he relied on the Delphic pronouncement by Lord Greene MR in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223, 229. The proposition which that case established is that a public decision-maker on whom statute confers a discretion must exercise it reasonably. It has been applied in numerous cases throughout the Commonwealth. We too have incorporated it as part of our common law. See, *Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn. Bhd.* [1979] 1 MLJ 135, 146, 148. The principle is so well-established that, as a ground of challenge, it has come to be known as "Wednesbury unreasonableness".

In *Council Of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374, Lord Diplock listed four grounds on which a decision in public law may be challenged. They are, he said, "illegality", "irrationality", "procedural impropriety" and "proportionality". He placed "Wednesbury unreasonableness" within the "irrationality" category.

Until very recently, it was thought that when the exercise of discretion by a public decision-maker is challenged on the ground of illegality or "Wednesbury unreasonableness", the Court merely examines the decision making process and not the correctness of the decision itself on merits. The fallacy of this approach has now been exposed by the majority decision of the Federal Court in *Ramachandran v. The Industrial Court of Malaysia*, Civil Appeal No: 02-13-94, yet unreported. It is a landmark decision. It stands as a beacon lighting the path of future development in the field of public law. Edgar Joseph Jr FCJ, who delivered one of the majority judgments, exploded the theory that judicial review is always concerned only with the decision making process and never with the decision itself. This is what he said (at pp. 8-11 of the transcript):

Lord Diplock's first ground for challenge, namely, illegality involves insisting that the authority or body whose decision is being impugned has kept strictly within the perimeters of their powers. A good example of this is the case of *Westminster City Council v. Great Portland Estates plc* [1985] AC 661, an *ultra vires* case, involving judicial construction of the Town and Country Planning Act, 1971. The question for decision was whether the Act permitted the relevant authorities, by resort to their development plans, to support the retention of traditional industries or was the ambit of the Act such as to permit only 'land use' aims to be pursued? It was held that 'the character of the use of the land not the particular purpose of a particular occupier' was the concern of planning and, therefore, the authority could not seek to favour any particular occupant or class of occupant. By thus confining the relevant authority strictly to the four walls of the powers conferred upon them by the Act, the Court was involved in the exercise of reviewing the impugned decision for *substance* and not just *process*.

Lord Diplock's second ground for challenge, namely, *irrationality* recognises a different route whereby the *substance* of a decision may be reviewed by the Courts. By this means, Lord Diplock made it clear that despite being legal, that is to say within the powers conferred, a decision may nevertheless, be struck down, for being contrary to *substantive principles*. In the words of Lord Diplock, 'a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.'

In this regard, the case of *Hall & Co. Ltd. v. Storeham-By-Sea UDC* [1964] 1 All ER 1, a planning case, affords a good illustration of how the Courts in the United Kingdom do in practice review a decision for *substance* even though it may comply with the legislative scheme. The defendant had granted the plaintiffs planning permission subject to conditions that required them to construct a road on their land and dedicate its use to the public. No compensation was payable to them for the loss of the land to be used for the road. Under Town and Country Planning Law, a local authority may in granting planning permission, impose such conditions as it may think fit. The Court struck down the condition, one of the grounds being that the condition was void for unreasonableness. On the one hand, while viewed from a traffic engineering point of view, the defendant's object was 'perfectly reasonable', but on the other hand, the course they adopted was 'utterly unreasonable'. In effect, the Court had examined the decision for *substance*, and held that the imposition of the condition was an abuse of power and unlawful. It is implicit in this decision that the Court was indirectly enforcing the fundamental civil right to be compensated adequately for property compulsorily acquired.

It follows that when the exercise of discretion by a public body, such as the appellant, is challenged, a Court is entitled to – indeed it must – examine the facts and determine whether the decision arrived at is reasonable in the sense described by Edgar Joseph Jr FCJ in the foregoing passage. If it is, then, it is safe from attack. If it is not, then, the appropriate remedy may be given.

In the present case, the learned Judge, as earlier observed, concluded that the appellant had acted *ultra vires* and unreasonably. In the light of the law in its present state, his decision really turns upon his appreciation of the facts of the case.

Against the Judge's decision, the appellant Local Authority has now appealed to us. Dato' Zaki who appeared for it has argued the appeal with his usual ability. He has taken us through the relevant affidavits and plans to show that the learned Judge came to the conclusion that the appellant had acted unreasonably because he had not fully appreciated the evidence before him. In short, there was no judicial appreciation of the facts. Dato' Zaki has demonstrated beyond any doubt that the conditions about which the respondent complains are not new ones imposed mid-stream at the whims and fancies of the appellant. They were there all along and the respondent took on the development of its land fully cognisant of the ramifications that were entailed. In a nutshell, the appellants had not acted either high-handedly or unreasonably. And there was certainly no bad faith on their part.

We think that there is merit in the arguments presented by Dato' Zaki. We will deal with the two points of essential contention between the parties.

In the case of the monsoon drain, there is abundant evidence that the respondent knew that it had to be constructed on State land. It knew or must be taken to know of the presence of squatters. Yet it did not complain about the condition at the time it was imposed. It did not appeal against the imposition of the condition. If its appeal had been unsuccessful, it may have moved for *certiorari* to quash the condition. But, as we have already observed, it did none of these things. And there is a reason for its earlier reticence. Locating the monsoon drain on State land meant that the respondent had the use of all its land. Had the monsoon drain been relocated on the respondent's land, it would have meant having to give up a portion of its land. That is probably why it initially accepted the condition on the layout plan.

Mr. Yeoh who appeared for the respondent has said, in answer, that the condition imposed by the appellant does not require his client to construct or upgrade the monsoon drain irrespective of the presence of squatters. Had the appellant imposed such a condition on the layout plan, says Mr. Yeoh, the respondent would have lodged an appeal for the removal of the condition. He argues that it is unreasonable of the appellants to expect the respondent to enter upon State land and deal with squatters when the respondent lacks *locus standi* to do so.

The short answer to Mr Yeoh's argument is that the condition requiring the construction or the upgrading of the monsoon drain cannot and should not be read *in vacuo*. It must be read in the light of the circumstances prevailing at and about the site at which the respondent proposed to construct its building. At the time the condition was indorsed on the layout plan, the respondent knew

or must be taken to have known of the status of the land on which the monsoon drain was required to be constructed. The respondent must have been aware that State land was involved. It must have known about the squatters. But it did nothing for three years. We do not think it ought to be heard to complain now. The Judge ought to have borne in mind that he was being moved for a remedy that was essentially discretionary in nature. He ought to have refused it in the light of the facts made known to him in the affidavits.

When this point was put to Mr Yeoh, he countered with the argument that the Court had jurisdiction to grant the first declaration in regard to the monsoon drain. He referred us to the earlier proceedings in this case. Azmel J had dismissed the action for want of jurisdiction. The respondent appealed to the Supreme Court which ruled that the High Court did have jurisdiction to grant the declarations sought. Mr Yeoh submitted that the matter was now closed and the issue of the High Court's jurisdiction could not now be re-agitated.

With respect, we are unable to accept Mr Yeoh's argument. It overlooks the vital difference between jurisdiction and discretion in the context of declaratory relief. No doubt that the High Court has jurisdiction to grant such relief. But it is equally settled that the remedy is discretionary in nature. A plaintiff who establishes his right may nevertheless be refused declaratory relief in certain circumstances eg, where he is guilty of laches or other unconscionable conduct. See, *Faber Merlin (M) Sdn. Bhd. & Ors. v. Lye Thai Sang & Anor.* [1985] 2 MLJ 380, 384.

The answer to Mr Yeoh's argument, we believe, lies in the following passage of the judgment of this Court in *Arab-Malaysian Credit Bhd v. Tan Seang Meng* [1995] 1 CLJ 773; [1995] 1 MLJ 225:

> Now, it is one thing to say that a Court has no power to make an order or to grant relief and quite a different thing to say that a particular order or relief will not, in accordance with settled principles, be granted. A refusal in such circumstances is in fact an exercise of jurisdiction and not a denial of it. This important distinction of principle is well brought out by the following passage in the advice of the Privy Council delivered by Lord Diplock in *Rediffusion (Hong Kong) Ltd. v. A-G of Hong Kong* [1970] AC 1136; [1970] 2 WLR 1264 which was applied by our Federal Court in *Dato' Menteri Othman bin Baginda & Anor. v. Dato' Ombi Syed Aiwi bin Syed Idrus* [1981] 1 MLJ 29:
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> > When considering an action claiming relief in the form of discretionary remedies only, it is thus important to distinguish between the jurisdiction of the Court to entertain the action at all, ie to embark upon the inquiry whether facts exist which would entitle the Court to grant the relief claimed, and a settled practice of the Court to exercise its discretion by withholding the relief if the facts found to exist disclose a particular kind of factual situation. The application of a discretion to refuse relief even though this may be pursuant to a settled practice is an exercise of jurisdiction, not a denial of it.

> Although those words were spoken in the context of declaratory relief, they are of universal application ...

Mr Yeoh has also argued that the respondent had a legitimate expectation that the State land on which the monsoon drain was to be constructed would be made available to it by the appellant. Counsel conceded that he did not raise or argue this point before the High Court. It is therefore an entirely new point. Had it been raised, the appellant may have wanted to put in some evidence on it. It cannot do so now. Mr. Yeoh, however, argues that no further evidence is necessary. We are not certain that he is right in his argument. But we will assume that he is. Yet the point does not avail his client at all.

This is how Counsel put his argument. Since the State land was not made available, the respondent was no longer under an obligation to fulfill the condition in question. In support of his submission, Mr. Yeoh relied on the decision of this Court in *Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan Berhad v. Majlis Perbandaran Pulau Pinang* [1996] 3 CLJ 335, where it was held that the grant of planning permission creates a substantive right through the operation of the doctrine of legitimate expectation.

In our judgment, the present case bears no resemblance to the facts of the *Sungai Gelugor* case. There, the local authority, having granted planning permission that was valid for a year, granted an extension of that permission subject to additional conditions. This Court held that the Sungai Gelugor Co-operative Society, as the developer, had a legitimate expectation that the planning permission would be extended upon the same conditions as those imposed upon its grant.

In the appeal now before us, the condition relating to the construction or upgrading of the monsoon drain was there from the very beginning. It was not subsequently imposed upon the respondent as was done in *Sungai Gelugor*. As we earlier observed, the respondent not only remained silent for three years after the imposition of the condition, but also completed 80% of the work before taking objection. In these circumstances, the doctrine of legitimate expectation has no application whatsoever to the facts of the present appeal.

The learned Judge has said, in his judgment, that it was unreasonable of the appellant to insist upon the compliance of the monsoon drain condition before it will issue the certificate of fitness for occupation. This argument is slightly different from the one advanced by Mr Yeoh before us, and to which we have addressed ourselves thus far. We do not agree with the Judge's conclusion. In our view, there was nothing unreasonable, in the circumstances of this case, in the appellant's insistence that the respondent fulfill the conditions subject to which planning permission was granted. It follows that the Judge was wrong in granting the first declaration.

We now turn to the second declaration. It has to do with the perimeter drain. In order to deal with this part of the case, it is necessary to recall some of the salient facts.

The requirement that the respondent construct a perimeter drain on its land did not appear as part of the planning permission. It appeared in the earthworks plan. The learned Judge held that that was not good enough. This is what he actually said about it:

> After careful consideration it is my view that it is wholly impermissible in law and without any justification in fact for this Court to hold that the requirement in CAB 2 [the earthworks plan] pertaining to the construction of a perimeter drain should be read into or in conjunction with CAB 3 [the amended plan]. My reasons are as follows –
>
> (a) CAB 2 – pertaining to earthworks operations, which is an entirely different stage in the development process of a land – was approved about 2½ years before CAB 3 and under an altogether different legislation being the Street, Drainage and Building Act 1974. Due to a lapse of such long period between the respective approvals of CAB 2 and CAB 3, it would not be unreasonable for the Plaintiffs to presume that CAB 2 had been deemed to be fully complied with upon approval of CAB 3 and that CAB 3 was intended to be the final and sole reference planning permission under the Act. Alternatively, it would appear that the very approval of the layout plan (CAB 3) presupposes the acceptance by the defendants that the earthworks had been completed in accordance with CAB 2. Also, as it has been conceded that under the Act a planning permission or a layout plan deals, *inter alia,* with drains generally and of all categories of drains – indeed, here, the monsoon drain and the building drains are clearly indicated in CAB 3 – there is no valid or plausible reason why the concrete perimeter drain could not also be drawn into CAB 3. Consequently, its absence would indicate that such drain is not a requirement in the development of a five-storey building, though it may have been a requirement in respect of an eleven(11)-storey building (that was never built).
>
> Furthermore, the earthworks plan cannot complement the approved amended layout plan, as in law it is the approved amended layout plan (CAB 3) together with the conditions endorsed thereon and not the earthworks plan (CAB 2) that constitutes the planning permission. And, the nature of the plan in CAB 3 itself does not permit the construction of the purported perimeter drain, having regard to sub-division of the land concerned and the conditions imposed thereto.
>
> (b) The earthworks plan (CAB 2) relates to earthworks required in respect of a 11-storey building whereas CAB 3 relates to the proposed construction of a five-storey building. As such, the specification or the very requirement for a perimeter drain may be different in the case of a smaller building structure.

(c) To hold that an earthworks plan could be read in conjunction or together with a layout plan, may hereafter give rise to a chaotic situation where, in the event of a situation occurring, obversely to the current case, in the two plans, a developer may probably contend that he is under no obligation to construct a perimeter drain shown in the layout plan because it is not in the earthworks plan approved earlier in time.

(d) The very issuance of the layout plan (CAB 3) would have the effect of implicitly superseding the earthworks plan. This is a reasonable and sensible approach which the Court has to take, *a fortiori* as, despite the defendants being clothed with sufficient and wide powers under s. 22 of the Act to refuse or to impose conditions when granting planning permission, yet the defendants did not impose in CAB 3, the condition requiring the construction of a concrete perimeter drain.

(e) The construction of proposed concrete perimeter drain if at all it was intended to be a requirement, despite its absence in CAB 3, would create an absurdity, as such drain would run parallel along the center of the 40-feet road to be constructed by the plaintiffs and the Public Works Department.

(f) To require that CAB 2 be read in conjunction with CAB 3 would also run foul of ss. 91 and 92 of the Evidence Act and the established authorities. See *Faber Merlin (M) Sdn. Bhd. & Ors. v. Lye Thai Sang* [1985] 2 MLJ 380 and *Keng Huat Film Co. Sdn. Bhd. v. Makhanlall (Prop)* Ltd. [1984] 1 MLJ 243.

(g) There is no ambiguity or defects in CAB 3 (the layout plan), and even if there is such defect or ambiguity, s. 93 of the Evidence Act 1950 would exclude extrinsic evidence to amend or explain such document. Indeed, whatever the parties may in their heart of hearts have intended, only the intentions as expressed in the CAB 3 may be construed. See *Goh Eng Wah v. Yap Phooi Yin & Anor.* [1985] 1 MLJ 329.

(h) Section 70A(5) of the Street, Drainage and Building Act 1974 (as amended) is inapplicable as it was never contended that earthworks have not been completed.

(i) Since I have held that CAB 2 cannot be read into or compliment (*sic*) CAB 3, I would adopt the *dicta* of Mohd Dzaiddin J (as he then was), in *Rethina Development Sdn. Bhd. v. Majlis Perbandaran Seberang Perai, Butterworth* (incidentally the same defendants) [1990] 2 MLJ 111 at page 114 – H right column, who had this to say:

> Based on the above facts, in my judgment, the MPSP had no power to add, amend or go behind the conditions imposed in the layout plan once approval of the said plan was granted.

In my opinion, that was an eminently correct approach to take; considering that a local authority has ample and wide powers under s. 22(3) of the Act to impose such 'conditions as it deems fit' when granting planning permission, it would be wholly unfair and unjust to allow them to impose

fresh conditions especially at the stage of issuance of occupation certificate of fitness, and after the developer – who is essentially also an investor of the State – had already incurred considerable construction expense. Regrettably, this has happened again in the current case involving the same local council.

For all the above reasons, I hold that the plaintiffs are under no obligations to build the concrete perimeter drain and the MPSP's requirement that this drain, which is not in CAB 3 (the layout plan), be constructed**,** as a condition for the issuance of an OCF is not justified in law and is *ultra vires* the Town and Country Planning Act 1976. The declaration sought as in prayer 3 of the plaintiffs' claim is thus also allowed.

With respect, we find ourselves unable to agree with the views expressed by the learned Judge in the foregoing passages.

First, the learned Judge has treated the Town and Country Planning Act, 1976 and the Street, Drainage and Building Act, 1978 as separate and unconnected pieces of legislation for the purposes of land development. Hence his use of the phrase "an altogether different legislation" to describe the latter Act.

Now, there may be, and in this country there are, several pieces of written law, both Acts of Parliament and subsidiary legislation, that regulate the development of land and the construction of or alteration to buildings. All these written laws contain requirements of one sort or another. Anyone proposing to engage in land development must observe the provisions of all the written laws that regulate this form of human activity.

It is therefore quite wrong to proceed upon the basis, as did the learned Judge, that compliance with the conditions attaching to the planning permission granted under the Town and Country Planning Act is quite sufficient. Regard must also be had to the equally compelling provisions of the Street, Drainage and Buildings Act which govern the carrying out of earthworks.

With respect, the learned Judge appears to have completely misunderstood the important role played by an earthworks plan in the context of land development. Earthworks play an important role in any development. It was in recognition of this that Parliament, amended the Street, Drainage and Building Act by introducing s. 70A, subsections (1), (2) and (3) of which reads as follows:

70A(1) No person shall commence or carry out or permit to be commenced or carried out any earthworks without having first submitted to the local authority plans and specifications in respect of the earthworks and obtained the approval of the local authority thereto.

(2) Where the earthworks are to be commenced or carried out for the purpose of the construction of any building, street, drain, sewer, or embankment, or for the laying of any cable or pipe, or for the purpose of any other construction or work whatsoever, the plans and

specifications relating to such construction or work required to be submitted under this Act or any by-laws made thereunder shall be submitted to the local authority at the same time as the plans and specifications in respect of the earthworks.

(3) In granting the approval under subsection (1) the local authority may impose such conditions as it deems fit.

This provision therefore makes it quite clear that earthworks are an integral part of land development. Equally is it clear that an earthworks plan is an important document. It follows that any conditions that are reasonably imposed by a local authority in relation to earthworks must be given the same importance as those conditions subject to which planning permission is granted under the parallel statute.

The second point we make is this. The learned Judge made the assumption that all the necessary earthworks had been completed at the date the respondent's amended plan was approved. As a matter of pure fact the assumption made is wrong because the perimeter drains, which are very much a part of the earthworks, were never constructed. And there is no dispute about this. It follows that the reasoning of the learned Judge lacks the necessary factual basis and his conclusion upon the point is a *non sequitur*.

We now turn to deal with the third, and probably the most important, ground upon which the learned Judge based his conclusion. In the passages of his judgment which we have reproduced earlier, the learned Judge has made it clear that he relied on the extrinsic evidence rule housed in ss. 91, 92 and 93 of the Evidence Act 1950, to justify his conclusion that the two plans – the approved amended layout plan and the earthworks plan – ought not to be read together. In the result, he held the appellant to have acted unreasonably in requiring the respondent to satisfy a new requirement as a condition for the issue of the certificate of fitness.

In our judgment, the reasoning of the Judge suffers from a serious infirmity. The authorities referred to and relied upon by him that deal with the extrinsic evidence rule deal with bilateral instruments in private law. *Faber Merlin (M) Sdn. Bhd. v. Lye Thai Sang & Anor.* [1985] 2 MLJ 380 was a case that concerned the interpretation of a sale and purchase agreement that related to a building while *Keng Huat Film Co. Sdn. Bhd. v. Makhanlall (Properties) Pte Ltd.* [1984] 1 MLJ 243 and *Goh Eng Wah v. Yap Phooi Yin & Anor.* [1985] 1 MLJ 329 were cases that concerned the construction of a covenant in a lease. The task of the Court in these cases was confined to ascertaining the objective intention of contracting parties.

The present case calls for no such exercise. What is involved here is the rather simple question whether the requirements imposed by the appellant under the power given it by one or more of the statutes that regulate the use of the

environment have been met. This, the learned Judge unfortunately did not appreciate. Neither did he recognise the irrelevance of the authorities cited by Counsel for the respondent and relied upon by him in his judgment. He failed to realise that he was dealing with a public law case and not a construction summons taken out to interpret the clauses in a private document. That led him to the error into which he fell.

In the present case, there are at least three plans. There is the original plan for an 11-storey building. Then, there is the earthworks plan. Finally, there is the amended plan for a five-storey building, submitted by the respondent after construction had commenced. Although each may deal with different aspects, they all relate to the same project. For that reason, they must be read together. The Judge was wrong when he said the opposite.

It follows that it is no answer for the respondent to say that it has met with all the conditions appearing on the amended approved layout plan. It must also comply with the conditions that appear on the earthworks plan. The condition about the perimeter drain may not appear on the approved amended layout plan. But it appears on the earthworks plan. That is sufficient. The Judge treated it as a condition that was imposed later by the appellants. He was wrong in his perception of the facts, because that is not how it happened. Acting upon an erroneous fact pattern, he applied the *dictum* of Dzaiddin J in *Rethina Development* (*supra*). That is certainly a misdirection. It has occasioned a miscarriage of justice in this case.

The fourth and last point made by the Judge is that the condition in question gives rise to an absurdity because the perimeter drain, if constructed, will run along the centre of a 40-foot road to be constructed by the respondent and JKR. This point caused us some anxiety when Mr Yeoh first mentioned it during his submissions. However, Dato' Zaki has carefully taken us through the relevant indorsements on all the relevant plans and demonstrated that the Judge misunderstood the evidence on the point. Having read with care the three plans earlier mentioned, we are satisfied that the absurdity referred to by the Judge does not exist.

Could it then be said that the appellant was acting unreasonably in witholding the certificate of fitness? We do not think so. That the law requires them to act as they have done is borne out by By-law 25(1)(b) of the Uniform Building By-Laws, 1986 (being subsidiary legislation made under the Street and Drainage Building Act, 1974) which provides as follows:

> 25(1) Certificate of fitness for occupation of a building shall be given when –
>
> (a) ...
>
> (b) all essential services, including access roads, landscape, car parks, drains, sanitary water and electricity installation, fire lifts, fire hydrant and others where required, sewerage and refuse disposal requirements have been provided.

For these reasons, the learned Judge was wrong in granting the respondent the second declaration.

There is one last matter that requires our attention. It is the order of the learned Judge directing an inquiry into damages.

We must say at once that nowhere in its summons did the respondent ask for an award of damages. It merely asked for an assessment. This is altogether wrong. Before an inquiry into or an assessment of damges may take place, there must be a judgment awarding damages. For, it is only under a judgment awarding damages that an assessment or inquiry may take place. Though none saw it, the point is critical.

For present purposes, however, it is sufficient to state that the order made by learned Judge really impinges upon the declarations he had granted. Once these are set aside, the order for assessment falls to the ground, automatically and without more. We therefore do not propose to deal with the brief complaint, mounted on substantive grounds, made by Dato' Zaki in the course of his submissions.

However, we will say this much. The respondent's case, when put at its highest, alleged "Wednesbury unreasonableness"; not malice. Yet, the Judge held that the appellant had acted in bad faith and out of malice. Having examined the relevant material in the record provided, we are entirely satisfied that there was absent any material to support this finding. We therefore deprecate, in the strongest of terms, the criticism levelled by the Judge against the appellant in that part of his judgment when he came to deal with the issue of damages. The severity of the language employed by him to describe the conduct of the appellant was certainly not called for. All the appellant was doing in this case was merely carrying out the duty imposed upon it by Parliament. And the learned Judge ought to have recognised this.

Having carefully considered this matter, we find the reasoning of the Judge to be fatally flawed. For the reasons given in this judgment, we have no alternative but to allow this appeal. The declarations granted by the learned Judge are hereby set aside. So is the order directing an assessment of damages. The respondent's originating summons is hereby dismissed. The costs of the proceedings in the High Court and the costs of this appeal shall be taxed and paid by the respondent to the appellant. The deposit paid into Court by the appellant is to be refunded to it.

Reported by Gan Peng Chiang